

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

TERRY CRANDALL MINCEY,	)	No. CV-F-04-6373 REC
	)	(No. CR-F-97-5266 REC)
	)	
Petitioner,	)	ORDER DENYING PETITIONER'S
	)	MOTION TO VACATE, SET ASIDE
vs.	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
	)	DIRECTING ENTRY OF JUDGMENT
UNITED STATES OF AMERICA,	)	FOR RESPONDENT
	)	
	)	
Respondent.	)	
	)	
	)	

On October 6, 2004, petitioner Terry Crandall Mincey timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Based on the court's initial review of petitioner's motion, the court concludes that petitioner has not demonstrated that he is entitled to relief on any of the grounds asserted in the motion.

**A. Grounds One, Three, Six and Eight Based on Blakely and Booker.**

A number of petitioner's grounds for relief are based on

1 Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531 (2004) and  
2 United States v. Booker, \_\_\_ U.S. \_\_\_, 125 S.Ct. 738 (2005).

3 Thus, in Ground One,, relying on Blakely and Booker,  
4 petitioner argues that his sentence is unconstitutional because  
5 it was imposed under the United States Sentencing Guidelines.  
6 Petitioner further contends that the base offense level and an  
7 enhancement for role in the offense were improperly determined by  
8 the court as opposed to a jury beyond a reasonable doubt.<sup>1</sup>

9 Petitioner is not entitled to relief on this ground.  
10 Neither Booker nor Blakely have been made retroactively  
11 applicable to cases on collateral review. See Cook v. United  
12 States, 386 F.3d 949 (9<sup>th</sup> Cir. 2004); Green v. United States,  
13 2005 WL 237204 (2<sup>nd</sup> Cir. 2005); McReynolds v. United States, 2005  
14 WL 237642 (7<sup>th</sup> Cir. 2005); In re Anderson, 2005 WL 123923 (11<sup>th</sup>  
15 Cir. 2005).

16 In Grounds Three and Eight, petitioner asserts that he was  
17 denied the effective assistance of appellate counsel when  
18 appellate counsel failed to raise Blakely and Booker on direct  
19 appeal, and "failed to appropriately raise the Blakely, Apprendi,  
20 Booker, and Fanfan issues either on Petition for Rehearing in the  
21 Ninth Circuit or on Petition for Certiorari to the Supreme  
22 Court." In Ground Six, petitioner contends that he was denied  
23 the effective assistance of trial counsel when trial counsel

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24  
25 <sup>1</sup>At the time petitioner filed this Section 2255 motion, the  
26 United States Supreme Court had not issued Booker. However,  
petitioner relied on the fact that the Supreme Court had granted  
certiorari in Booker.

1 "failed to raise the Blakely, Booker and Fanfan issues prior to  
2 trial."

3 In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme  
4 Court held that "[o]ther than the fact of a prior conviction, any  
5 fact that increases the penalty for a crime beyond the prescribed  
6 statutory maximum must be submitted to a jury, and proved beyond  
7 a reasonable doubt." 530 U.S. at 490. At the time of  
8 petitioner's conviction and sentencing, it was established law in  
9 the Ninth Circuit that sentencing enhancements under the  
10 Sentencing Guidelines were determined by the sentencing judge  
11 under the preponderance of the evidence standard as long as the  
12 sentence imposed did not exceed the statutory maximum. See  
13 United States v. Hernandez-Guardado, 228 F.3d 1017, 1026-1027  
14 (9<sup>th</sup> Cir. 2000). Petitioner's direct appeal to the Ninth Circuit  
15 was filed in 2001. Petitioner's conviction and sentence were  
16 affirmed by the Ninth Circuit on February 28, 2003. Blakely,  
17 which involved state law, was not issued by the Supreme Court  
18 until June 24, 2004. Although Blakely called the ruling in  
19 Hernandez-Guardado into doubt, Blakely was not applied to initial  
20 sentencings under the Sentencing Guidelines by the Ninth Circuit  
21 until it issued United States v. Ameline, 376 F.3d 967 (9<sup>th</sup> Cir.  
22 2004), on July 21, 2004.<sup>2</sup> The Supreme Court's decision in  
23 Booker, applying Blakely to the Sentencing Guidelines, was not  
24 decided by the Supreme Court until January 12, 2005. Petitioner

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25 <sup>2</sup>Rehearing en banc has been granted in Ameline at 401 F.3d  
26 1007 (9<sup>th</sup> Cir. 2005).

1 was convicted on April 17, 2000. Petitioner's appeal of his  
2 conviction and sentence was filed in 2001. His conviction and  
3 sentence were affirmed by the Ninth Circuit on February 28, 2003.  
4 The petition for rehearing was filed in the Ninth Circuit on  
5 April 3, 2003. The petition for writ of certiorari was filed in  
6 the Supreme Court on August 5, 2003. As a matter of law, the  
7 Blakely and Booker rulings cannot give rise to a viable claim of  
8 ineffective assistance of counsel based on appellate counsel's  
9 failure to object to events that Blakely and Booker may have  
10 rendered unconstitutional months later contrary to binding  
11 precedent. See Aird v. United States, 339 F.Supp.2d 1305, 1313-  
12 1314 (S.D.Ala. 2004).

13 Therefore, to the extent that petitioner's claims for relief  
14 are based on Blakely and Booker, the claims are without merit and  
15 are denied.

16 **B. Grounds Two, Four and Five.**

17 Petitioner contends that he was denied the effective  
18 assistance of counsel when his appellate counsel failed to raise  
19 any sentencing and/or guideline issues on direct appeal. In so  
20 asserting, petitioner refers to the claims of ineffective  
21 assistance of counsel raised in Grounds Four and Five, infra.

22 The standards governing an assertion of ineffective  
23 assistance of counsel are set forth in Strickland v. Washington,  
24 466 U.S. 668 (1984). As explained in United States v. Quintero-  
25 Barraza, 78 F.2d 1344, 1348 (9th Cir. 1995), cert. denied, 519  
26 U.S. 848 (1996):

1 According to Strickland, there are two  
2 components to an effectiveness inquiry, and  
3 the petitioner bears the burden of  
4 establishing both ... First, the  
5 representation must fall 'below an objective  
6 standard of reasonableness.' ... Courts  
7 scrutinizing the reasonableness of an  
8 attorney's conduct must examine counsel's  
9 'overall performance,' both before and at  
10 trial, and must be highly deferential to the  
11 attorney's judgments ... In fact, there  
12 exists a 'strong presumption that counsel  
13 "rendered adequate assistance and made all  
14 significant decisions in the exercise of  
15 reasonable professional judgment."' ... In  
16 short, defendant must surmount the  
17 presumption that, 'under the circumstances,  
18 the challenged action "might be considered  
19 sound trial strategy."' ... Thus, the proper  
20 inquiry is 'whether, in light of all the  
21 circumstances, the identified acts or  
22 omissions were outside the wide range of  
23 professionally competent assistance.' ....

13 If the petitioner satisfies the first prong,  
14 he must then establish that there is 'a  
15 reasonable probability that, but for  
16 counsel's unprofessional errors, the result  
17 would have been different ....

16 In Grounds Four and Five, petitioner contends that he  
17 received ineffective assistance of appellate counsel when  
18 appellate counsel failed to raise on appeal that petitioner was  
19 entitled "to the role adjustment under Section 3B1.1(c)" and to  
20 raise on appeal that the Government's contention that level 38  
21 was the correct base offense level under Section 2D1.1(c)(1),  
22 even though no illegal drugs were seized, was error.

23 Petitioner was sentenced pursuant to the Sentencing  
24 Guidelines in effect in 1998.

25 Petitioner has not demonstrated that appellate counsel was  
26 ineffective in failing to raise on appeal the adjustment to

1 petitioner's base offense level pursuant to § 3B1.1(c). The  
2 record in this action demonstrates that petitioner "was an  
3 organizer, leader, manager, or supervisor in any criminal  
4 activity ...." Petitioner presents nothing in this motion  
5 demonstrating to the contrary. Failure of appellate counsel to  
6 raise a sentencing issue on appeal does not constitute  
7 ineffective assistance of counsel where the action complained of  
8 did not result in an incorrect sentence. See United States v.  
9 Schaflander, 743 F.2d 714, 719 (9<sup>th</sup> Cir. 1984), cert. denied, 470  
10 U.S. 1058 (1985).

11 Petitioner's contention that appellate counsel was  
12 ineffective by failing to raise on appeal the calculation of the  
13 offense level pursuant to § 2D1.1(c) when no drugs were seized is  
14 without merit. Application Note 12 to § 2D1.1 provides "[w]here  
15 there is no drug seizure or the amount seized does not reflect  
16 the scale of the offense, the court shall approximate the  
17 quantity of controlled substance."<sup>3</sup>  
18

19 <sup>3</sup>Petitioner implies that appellate counsel was ineffective in  
20 failing to raise on appeal that the CLS chemicals would not have  
21 yielded 51,000 pounds of methamphetamine. However, there is  
22 nothing in the record and no facts or evidence are alleged in  
23 petitioner's motion substantiating that the CLS chemicals would not  
24 have yielded 51,000 pounds of methamphetamine. Furthermore,  
25 petitioner, who was representing himself at sentencing, did not  
26 file objections concerning the quantity of methamphetamine that  
could have been yielded by the CLS chemicals and did not present  
any expert evidence concerning this issue. [P]etitioner asserts  
that "[c]ompetent counsel, at sentencing, would have introduced  
expert testimony, and a multitude of other evidence, challenging  
the government's contention (accepted by the Court while Mr. Mincey  
represented himself, not being an attorney, and not being legally  
competent, or educated, in any way, in connection with Guideline

1  
2 Therefore, petitioner is not entitled to relief on these  
3 grounds.

4 **C. Grounds Four, Five, Nine and Ten.**

5 In Ground Four, petitioner contends that he was denied the  
6 effective assistance of counsel "when the trial court denied his  
7 motion for new appointed counsel on at least two occasions,  
8 resulting in him improperly representing himself at his  
9 sentencing and forfeiture hearings, and in the filing of post-  
10 trial motions and in filings for the sentencing hearing,  
11 including objections to the presentence report." In Ground Five,  
12 petitioner contends that he was denied the effective assistance  
13 of counsel ... when the trial court violated Faretta v.  
14 California ... and allowed Mr. Mincey to represent himself at his  
15 sentencing and forfeiture hearings."

16 In Grounds Nine and Ten, petitioner contends that he was  
17 denied the effective assistance of appellate counsel when  
18 appellate counsel failed to raise on appeal that the court  
19 improperly denied petitioner's motion for new counsel to  
20 represent him for post-conviction proceedings and failed to raise  
21 on appeal that the court improperly permitted petitioner to  
22 represent himself during post-conviction proceedings.

23 \_\_\_\_\_  
24 matters), that the CLS chemicals would have yielded 51,000 pounds  
25 of methamphetamine." However, as discussed infra, petitioner  
26 validly exercised his right to self-representation for post-  
conviction proceedings and cannot now claim that appellate counsel  
was ineffective for failing to raise an issue on appeal that  
petitioner did not raise at sentencing.

1 To the extent that petitioner claims that trial counsel was  
2 ineffective in moving the court to appoint new counsel to  
3 represent him, petitioner's claim is without merit.  
4

5 The record in this action establishes that petitioner's  
6 trial counsel, Marshall Hodgkins, filed on petitioner's behalf an  
7 ex parte motion for new counsel on May 9, 2000. Petitioner sent  
8 a letter to the court making the same request, which letter was  
9 filed on May 10, 2000. The court conducted an in camera hearing  
10 with respect to this motion on May 22, 2000 by Order filed under  
11 seal on May 22, 2000. On November 9, 2000, the court received a  
12 letter from Mr. Hodgkins expressing concern about his continued  
13 representation of petitioner. According to the record in this  
14 action, by Order filed on November 14, 2000, the court granted  
15 Mr. Hodgkins' request for a closed hearing concerning the  
16 representation of petitioner, setting the matter for hearing on  
17 November 20, 2000. The court conducted an in camera inquiry on  
18 November 20, 2000 concerning petitioner's renewed motion for  
19 substitution of counsel. The court denied this second motion for  
20 substitution of counsel by Order filed under seal on November 29,  
21 2000. The court has reviewed the transcripts of the in camera  
22 hearings and the Orders denying the two motions for substitution  
23 of counsel. The court concludes that Mr. Hodgkins was not  
24 constitutionally ineffective in presenting these two motions and  
25 his position. Petitioner was allowed to address the court at  
26 both hearings. As stated in detail in the two Orders denying the



1 motions for substitution of counsel, the court concluded after  
2 reviewing the record and the standards governing resolution of  
3 such a request that petitioner was not entitled to new counsel.  
4 Petitioner's instant motion provides no new arguments or facts  
5 from which it may be inferred that trial counsel was ineffective  
6 in presenting and arguing the two motions for substitution of  
7 counsel and provides nothing from which the court may infer that  
8 it would have ruled differently than it did.

9  
10 Petitioner's claim that he was denied the effective  
11 assistance of counsel "when the trial court violated Faretta v.  
12 California ... and allowed Mr. Mincey to represent himself at his  
13 sentencing and forfeiture hearings" also is without merit.

14 The record in this action establishes that, following oral  
15 argument on the motions for new trial conducted on February 1,  
16 2001, petitioner, through Mr. Hodgkins, requested a closed  
17 session. At that closed session, petitioner made a request to  
18 represent himself. The court took the matter under submission,  
19 requesting that petitioner and Mr. Hodgkins discuss this request,  
20 and placed the request on calendar in in camera session on  
21 February 2, 2001. At the February 2, 2001 hearing, Mr. Hodgkins  
22 advised the court that he had discussed the matter with  
23 petitioner and that it was still petitioner's request to  
24 represent himself. A defendant has a constitutional right to  
25 represent herself in a criminal trial. Faretta v. California,  
26 422 U.S. 806 (1975). However, because a defendant who wishes to

1 represent himself gives up many benefits associated with the  
2 right to counsel, the decision to represent himself must be  
3 knowing, intelligent and voluntary. In addition, the request for  
4 self-representation must be unequivocal. Jackson v. Ylst, 921  
5 F.2d 882, 888 (9th Cir. 1990). Before waiving right to counsel,  
6 the defendant must be made aware of the nature of the charges and  
7 the possible penalties, as well as the dangers and disadvantages  
8 of self-representation in a complex area where experience and  
9 professional training are most helpful. Before granting a  
10 defendant's request to serve as his own counsel, the court must  
11 discuss with defendant, in open court, the factors set forth  
12 above in determining whether the waiver of right to counsel and  
13 the decision to represent himself was knowing, intelligent and  
14 voluntary. United States v. Harris, 683 F.2d 322, 324 (9th Cir.  
15 1982). The court conducted this inquiry with petitioner in  
16 closed session on February 2, 2001 and concluded that  
17 petitioner's request to represent himself was knowing, voluntary  
18 and unequivocal and therefore granted petitioner's request.  
19 (Doc. 588). The court concludes that there is nothing Mr.  
20 Hodgkins could have added to this inquiry and that, therefore,  
21 petitioner has not established ineffective assistance of counsel  
22 on this ground.

23 As noted, in Grounds Nine and Ten, petitioner contends he  
24 was denied the effective assistance of appellate counsel when  
25 appellate counsel failed to raise on appeal that the court  
26

1 improperly denied petitioner's motion for new counsel to  
2 represent him for post-conviction proceedings and failed to raise  
3 on appeal that the court improperly permitted petitioner to  
4 represent himself during post-conviction proceedings.  
5

6 Although it may be arguable that appellate counsel's failure  
7 to raise the two denials of the motions for substitution of  
8 counsel on appeal satisfies the first prong of the Strickland  
9 standard, the court concludes that petitioner has not established  
10 that he was prejudiced by this failure, i.e., that petitioner's  
11 conviction or sentence would have been reversed by the Ninth  
12 Circuit on appeal on this ground. The court considered the  
13 grounds asserted in support of both motions and considered the  
14 factors required by law in resolving motions for substitution of  
15 counsel in denying both motions. The Ninth Circuit reviews the  
16 denial of motions for substitution of counsel for abuse of  
17 discretion. See United States v. Corona-Garcia, 210 F.3d 973,  
18 976 (9<sup>th</sup> Cir.), cert. denied, 531 U.S. 898 (2000). Petitioner  
19 has not demonstrated a reasonable probability that, but for  
20 appellate counsel's failure to raise this issue on appeal, the  
21 Ninth Circuit would have found that this court's denial of the  
22 two motions for substitution of counsel were an abuse of  
23 discretion.

24 With regard to petitioner's claim that he was denied the  
25 effective assistance of appellate counsel because of appellate  
26 counsel's failure to argue that the court improperly granted

1 petitioner's request for self-representation in post-conviction  
2 proceedings, it may be arguable that this failure satisfies the  
3 first prong of the Strickland standard. However, petitioner has  
4 not demonstrated a reasonable probability that, but for the  
5 failure of appellate counsel to raise this issue on appeal, the  
6 Ninth Circuit would have reversed petitioner's conviction and  
7 sentence. The court has reviewed the transcript of the Faretta  
8 inquiry conducted on February 2, 2001 and concludes that it  
9 complied with the legal requirements set forth above in  
10 determining that petitioner's request to represent himself in  
11 further post-conviction proceedings was knowing, intelligent and  
12 voluntary.

13 **D. Ground Eleven.**

14 Petitioner contends that he was denied the effective  
15 assistance of trial counsel when trial counsel "failed to  
16 adequately point out and argue to the court and the jury that the  
17 evidence was insufficient, as a matter of law, to sustain a  
18 conviction on each of the charges on which he was tried, and on  
19 the forfeiture count."

20 Petitioner has not demonstrated ineffective assistance of  
21 counsel. Mr. Hodgkins argued to the court and to the jury that  
22 the evidence was insufficient to convict petitioner of the  
23 charges on which he was indicted. On appeal the Ninth Circuit  
24 ruled that the evidence was sufficient to sustain petitioner's  
25 convictions and the forfeiture. Petitioner's conclusory  
26

1 assertion that Mr. Hodgkins' arguments regarding the sufficiency  
2 of the evidence were not "adequate" does not suffice to establish  
3 ineffective assistance of counsel.  
4

5 At the time of the evidentiary hearing regarding the  
6 forfeiture count, which was tried to the court by stipulation of  
7 the parties, petitioner was representing himself. Therefore,  
8 petitioner cannot assert ineffective assistance of counsel on  
9 this ground.

10 **E. Ground Twelve.**

11 Petitioner contends that he was denied the effective  
12 assistance of appellate counsel because appellate counsel "failed  
13 to adequately point out and argue to the Ninth Circuit that the  
14 evidence adduced at trial was insufficient, as a matter of law,  
15 to sustain a conviction of each of the charges on which he was  
16 tried, and on the forfeiture count."

17 Petitioner's claim is without merit. Appellate counsel  
18 raised the sufficiency of the evidence as a ground for appeal.  
19 The Ninth Circuit ruled on appeal that the evidence was  
20 sufficient to sustain petitioner's convictions. Petitioner's  
21 conclusory assertion that counsel's arguments were not "adequate"  
22 does not suffice to establish ineffective assistance of appellate  
23 counsel.

24 **F. Ground Thirteen.**

25 Petitioner argues that he was denied the effective  
26 assistance of trial counsel when Mr. Hodgkins "failed to

1 adequately investigate the case ...."

2  
3 Petitioner is not entitled to relief on this ground. A  
4 conclusory assertion that counsel failed to "adequately  
5 investigate" does not suffice to establish ineffective assistance  
6 of counsel.

7 Petitioner further contends that Mr. Hodgkins

8 failed to present evidence that government  
9 official(s) clearly and affirmatively misled  
10 Mr. Mincey into believing that his actions  
11 were lawful, thereby supporting his defense  
12 of entrapment by estoppel. This was in spite  
of the fact that Mr. Mincey repeatedly and  
clearly outlined for his trial counsel, in  
detail, exactly what had to be done and shown  
in order to make out a good entrapment by  
estoppel defense.

13 However, the court ruled during the trial and in denying  
14 petitioner's motion for new trial that petitioner was not  
15 entitled to the defense of entrapment by estoppel because no  
16 evidence was presented that any federal official or agent so  
17 authorized by the federal government expressly advised petitioner  
18 that the conduct with which he was eventually charged was legal  
19 or did not constitute a violation of the law, citing United  
20 States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9<sup>th</sup> Cir.), cert.  
21 denied, 531 U.S. 892 (2000); United States v. Collins, 61 F.3d  
22 1379, 1385 (9<sup>th</sup> Cir.), cert. denied, 516 U.S. 1000 (1995); United  
23 States v. Brabner, 951 F.2d 1017, 1024-1027 (9<sup>th</sup> Cir. 1991). The  
24 court's decision was affirmed by the Ninth Circuit on appeal.  
25 Petitioner describes no evidence that would have allowed the  
26 defense of entrapment by estoppel under these standards to be

1 presented to the jury. Consequently, petitioner has not  
2 established ineffective assistance of counsel on this ground.

3  
4 **G. Ground Fourteen.**

5 Petitioner contends that he was denied the effective  
6 assistance of trial counsel when Mr. Hodgkins "advised him to  
7 testify when his trial counsel knew or should have known that the  
8 government's evidence was insufficient, as a matter of law, to  
9 sustain a conviction on each of the counts on which he was  
10 tried."

11 Petitioner is not entitled to relief on this ground.  
12 Following the conclusion of the Government's case in chief, the  
13 defendants made motions for judgment of acquittal pursuant to  
14 Rule 29, Federal Rules of Criminal Procedure, which motions were  
15 denied by the court. The post-conviction motions for judgment of  
16 acquittal and motions for new trial were denied by the court. As  
17 noted supra, appellate counsel unsuccessfully argued on appeal  
18 that the evidence was not sufficient to sustain petitioner's  
19 convictions.

20 Consequently, petitioner's assertion that calling petitioner  
21 as a witness in his own defense constituted ineffective  
22 assistance of counsel because Mr. Hodgkins knew that the evidence  
23 was insufficient is without merit.

24 **H. Ground Fifteen.**

25 Petitioner contends that he was denied the effective  
26 assistance of trial counsel when trial counsel failed to object

1 at trial to the constructive amendment of the Indictment.

2 Petitioner contends that counsel's failure to do resulted in  
3 plain error review by the Ninth Circuit on appeal but that de  
4 novo review would have resulted in petitioner's convictions being  
5 reversed.

6 Petitioner has not shown that he is entitled to relief on  
7 this ground.

8 A constructive amendment occurs if there is a change in the  
9 terms of the indictment, whether literal or in effect. United  
10 States v. Dipentino, 242 F.3d 1090, 1094 (9<sup>th</sup> Cir. 2001). A  
11 variance occurs when the proof introduced at trial differs  
12 materially from the facts alleged in the indictment. Jones v.  
13 Smith, 231 F.3d 1227, 1232 (9<sup>th</sup> Cir. 2000). As was the case on  
14 direct appeal, petitioner points to no facts showing that the  
15 terms of the indictment were altered by the evidence introduced  
16 at trial.

17 Consequently, petitioner has not demonstrated that Mr.  
18 Hodgkins was ineffective in failing to object to alleged  
19 constructive amendment of the indictment and petitioner's claim  
20 for relief on this ground is denied.

21 **I. Ground Sixteen.**

22 Petitioner contends that he was denied the effective  
23 assistance of trial counsel when counsel "failed to object to the  
24 admission of the Chemical Handler's Manual, or the testimony and  
25 exhibits that reflected certain laws and regulations concerning  
26



1 the nature and scope of his company's (CLS's) obligations as a  
2 chemical retailer." Petitioner asserts that, because of these  
3 failures to object, the Ninth Circuit reviewed the admission of  
4 this evidence under the plain error standard of review but that  
5 "[o]rdinary review ... after proper objection, would have  
6 resulted in a finding of non-harmless error, and a reversal of  
7 [petitioner's] convictions."

8 Petitioner is not entitled to relief on this ground.  
9 Petitioner does not allege a basis for objecting to the admission  
10 of any of this evidence, much less that any such objections would  
11 have been sustained. Therefore, petitioner has not demonstrated  
12 ineffective assistance of counsel on this ground.

13 **J. Ground Seventeen.**

14 Petitioner contends that he was denied effective assistance  
15 "when his trial counsel failed to object to each and every  
16 instance of prosecutorial and judicial misconduct, thereby  
17 resulting in the Ninth Circuit not granting the appropriate  
18 standard of review, which would have resulted in a reversal."

19 Petitioner's claim is without merit. Petitioner's motion  
20 describes no instances of alleged judicial or prosecutorial  
21 misconduct.

22 Furthermore, this court rejected petitioner's claims of  
23 judicial misconduct in the "Order Denying Defendant Terry  
24 Crandall Mincey's Motion for New Trial, Judgment of Acquittal,  
25 and Arrest of Judgment" filed on March 8, 2001 as did the Ninth  
26

1 Circuit on direct appeal. Failure of trial counsel to move for a  
2 mistrial for alleged judicial misconduct does not constitute  
3 ineffective assistance of counsel where the actions complained of  
4 did not constitute judicial misconduct. See United States v.  
5 Schaflander, 743 F.2d 714, 719 (9<sup>th</sup> Cir. 1984), cert. denied, 470  
6 U.S. 1058 (1985).

7  
8 The court also rejected petitioner's claims of prosecutorial  
9 misconduct in the "Order Denying Defendant Terry Crandall  
10 Mincey's Motion for New Trial, Judgment of Acquittal, and Arrest  
11 of Judgment" filed on March 8, 2001. As noted, failure of trial  
12 counsel to move for a mistrial for alleged prosecutorial  
13 misconduct does not constitute ineffective assistance of counsel  
14 where the actions complained of did not constitute prosecutorial  
15 misconduct. Schaflander, supra. Furthermore, on direct appeal,  
16 the Ninth Circuit ruled in pertinent part with respect to  
17 petitioner's claims of prosecutorial misconduct at trial:

18 Where Mincey objected to the prosecutor's  
19 alleged misconduct, we review for harmless  
20 error ... On the other hand, where Mincey did  
21 not object, we review for plain error ...  
22 Reversal based on prosecutorial misconduct is  
23 appropriate only if it appears more probable  
24 than not that prosecutorial misconduct  
25 materially affected the fairness of the trial  
26 ... Mincey fails to cite to any parts of the  
record, or any other facts, that would show  
prosecutorial misconduct. Thus, under either  
standard of review, there is no basis for us  
to conclude that Mincey's conclusory  
allegations of prosecutorial misconduct  
materially affected the fairness of the  
trial.

Therefore, petitioner's claims that a contemporaneous objection

1 would have resulted in a different standard of review and a  
2 reversal of his conviction is not substantiated.

3  
4 **K. Ground Eighteen**

5 Petitioner contends that he was denied effective assistance  
6 "when trial counsel failed to raise prosecutorial misconduct in  
7 the grand jury prior to his trial." Petitioner asserts that this  
8 "omission resulted in the Ninth Circuit failing to review this  
9 issue."

10 Petitioner is not entitled to relief on this ground.  
11 Petitioner's motion presents no facts from which it may be  
12 inferred that any prosecutorial misconduct occurred before the  
13 grand jury, that this court would have dismissed the indictment  
14 because of such prosecutorial misconduct if a motion to dismiss  
15 the indictment based on this ground had been made, or that the  
16 Ninth Circuit would have reversed his conviction on the ground of  
17 prosecutorial misconduct before the grand jury if trial counsel  
18 had made such a motion and this court denied it.

19 **L. Ground Nineteen.**

20 Petitioner contends that he was denied effective assistance  
21 of counsel "when the Court improperly seized his assets at the  
22 time of his arrest, thereby depriving him of the ability to  
23 fairly defend himself."

24 Petitioner is not entitled to relief on this ground.  
25 Petitioner's defense attorney joined in co-defendant Lewis's  
26 opposition to the Government's Request for a Preliminary

1 Injunction, wherein the Government sought to restrain the  
2 financial assets of the defendants. One of the arguments made by  
3 co-defendant Lewis was that she needed the assets to pay  
4 attorneys' fees. The Request for Preliminary Injunction was  
5 argued on March 23, 1998 and granted by Order filed on April 3,  
6 1998. The implication in petitioner's motion that counsel was  
7 ineffective for failing to object to the seizure of petitioner's  
8 assets on the ground that petitioner needed them to retain  
9 counsel of his choice is without merit. See United States v.  
10 Monsanto, 491 U.S. 600, 616 (1989) (rejecting argument that  
11 pretrial seizure of assets interferes with a criminal defendant's  
12 Fifth Amendment right to due process and Sixth Amendment right to  
13 counsel); Caplin & Drysdale, Chartered v. United States, 491 U.S.  
14 617, 632-633 (1989) (rejecting argument that general seizure of  
15 assets interferes with a criminal defendant's Sixth Amendment  
16 right to retain counsel). The court so ruled in the April 3,  
17 1998 Order. Failure to raise a meritless argument or to make a  
18 meritless motion does not constitute ineffective assistance of  
19 counsel. See Boag v. Raines, 769 F.2d 1341, 1344 (9<sup>th</sup> Cir. 1985).  
20

21 **M. Ground Twenty.**

22 Petitioner contends that he was denied effective assistance  
23 because his "conviction was obtained by statements improperly and  
24 unconstitutionally obtained from him, and his trial counsel was  
25 ineffective in not preventing the use of these statements."  
26

Petitioner is not entitled to relief on this ground.

1 Petitioner asserts no facts from which it may be inferred that  
2 any incriminating statements to law enforcement made by  
3 petitioner were obtained in violation of the Due Process Clause  
4 or Miranda v. Arizona.

5 **N. Ground Twenty-One.**

6 Petitioner contends that his conviction was obtained "by the  
7 unconstitutional failure of the prosecution to disclose to the  
8 defendant evidence favorable to him in connection with his  
9 defense of entrapment by estoppel and insufficiency of the  
10 evidence."

11 Petitioner is not entitled to relief on this ground.

12 A Brady violation occurs when the government suppresses  
13 material evidence, including impeachment evidence, favorable to  
14 the accused. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio  
15 v. United States, 405 U.S. 150, 154-155 (1972). Such evidence is  
16 material if there is a reasonable probability that the outcome of  
17 the trial would have been different if the evidence had been  
18 disclosed. United States v. Bagley, 473 U.S. 667, 682 (1985). A  
19 reasonable probability is established when the failure to  
20 disclose evidence could reasonably be taken to put the whole case  
21 in such a different light as to undermine confidence in the  
22 verdict. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

23 Petitioner does not describe the allegedly favorable  
24 evidence suppressed by the Government. Therefore, he has not  
25 shown that a Brady violation has occurred or that he is entitled  
26

1 to relief because of a Brady violation.

2  
3 **O. Grounds Twenty-Two, Twenty-Three and Twenty-Four.**

4 Petitioner contends that his conviction and sentence were in  
5 violation of the Double Jeopardy Clause "inasmuch as his sentence  
6 represented double punishment for the same offense for which he  
7 had already been punished by criminal forfeiture and the illegal  
8 seizure of his assets at the time of his arrest." Petitioner  
9 further contends that he was denied the effective assistance of  
10 trial and appellate counsel when counsel failed to raise this  
11 double jeopardy claim.

12 Petitioner's claims are without merit. Petitioner's assets  
13 were seized and preliminarily restrained pursuant to 21 U.S.C. §  
14 853. The Superseding Indictment and the Second Superseding  
15 Indictment alleged counts for criminal forfeiture.  
16 Petitioner's assets were not forfeited to the United States until  
17 after petitioner's conviction and as part of his criminal  
18 sentence. Therefore, petitioner's assets were forfeited pursuant  
19 to the criminal forfeiture statute during the same proceeding as  
20 his criminal conviction. It is well-settled that Congress may  
21 impose multiple punishments for the same conduct without  
22 violating the Double Jeopardy Clause, so long as it clearly  
23 expresses its intent to do so. Such is the case here. There was  
24 no violation of the Double Jeopardy Clause. See Westine v.  
25 United States, 1996 WL 456031 (6<sup>th</sup> Cir. 1996). Consequently,  
26 neither trial counsel nor appellate counsel were ineffective in

1 failing to raise this claim.

2 **P. Ground Twenty-Five.**

3  
4 Petitioner contends he was denied the effective assistance  
5 of trial counsel

6 when the critical defense forensic expert in  
7 the field of chemistry was hired on a short  
8 time line, was incompetent to testify, and  
9 was hearing impaired. Mr. Mincey's trial  
counsel had ample time to retain and prepare  
one of the many forensic experts in this  
field so that Mr. Mincey would have had an  
effective defense.

10 Petitioner presents no facts from which it may be inferred  
11 the forensic expert was incompetent to testify or that his  
12 preparation as a defense witness was impaired because he was  
13 retained on a "short time line." That the expert witness was  
14 hearing impaired has no bearing on his competence as an expert.<sup>4</sup>

15 Therefore, petitioner has not established ineffective  
16 assistance of counsel on this ground.

17 **Q. Ground Twenty-Six.**

18 Petitioner contends he was denied effective assistance  
19 because trial counsel

20 failed to prepare and investigate the case  
21 and failed to be prepared for the  
government's introduction of critical

---

22  
23 <sup>4</sup>Petitioner contends that the expert witness "was further  
24 undermined, humiliated and made ineffective by the trial court's  
25 shouting at him and interference in his testimony." However, this  
26 court rejected petitioner's claim that he was entitled to a new  
trial because of judicial misconduct arising from these  
allegations. On appeal the Ninth Circuit rejected petitioner's  
argument that the court committed judicial misconduct based on  
these allegations.

1 evidence, including California statutes,  
2 misinformation in connection with these  
3 statutes, and an IRS form 8300. By the time  
4 this evidence was introduced (improperly) by  
5 the prosecution, no appropriate objections  
6 had been made, no motions in limine or to bar  
the evidence had appropriately been filed,  
and no defense planning or strategy to meet  
or counter this evidence had occurred or been  
developed.

7 The Ninth Circuit ruled on appeal that the admission of  
8 these documents was not error. Consequently, petitioner has not  
9 demonstrated that trial counsel was ineffective because of his  
10 failure to object to the admission of the described evidence.

11 **R. Ground Twenty-Seven.**

12 Petitioner contends he was denied effective assistance when  
13 trial counsel

14 failed to make the appropriate evidentiary  
15 objections, failed to make the appropriate  
16 arguments, failed to file the appropriate  
17 motions in limine, and failed to prepare and  
18 hire the appropriate forensic experts which  
19 would have resulted in legal objections to  
the admissibility of the testimony of  
industry experts and a partially redacted  
newspaper article being sustained by either  
the district court or the Ninth Circuit.

20 To the extent that this ground for relief repeats the claims  
21 of ineffective assistance set forth in Grounds Twenty-Five and  
22 Twenty-Six, these claims are without merit. See discussion  
23 supra.

24 Petitioner's claim that counsel was ineffective in failing  
25 to object to the admissibility of the testimony of industry  
26 experts also is without merit. The Ninth Circuit has ruled that



1 the admission of this evidence was proper.

2  
3 Petitioner's has not demonstrated that counsel was  
4 ineffective because different arguments would have resulted in  
5 the exclusion from evidence of the partially redacted newspaper  
6 article is without merit. Petitioner does not describe what  
7 additional arguments could have been made which would have  
8 resulted in the exclusion of this evidence. Furthermore, the  
9 Ninth Circuit has ruled that the admission of this evidence was  
10 proper.

11 **S. Ground Twenty-Eight.**

12 Petitioner contends that "[t]he products of CLS were not  
13 covered by or illegally distributed under 21 U.S.C. § 841(d)(1)  
14 [sic], as a matter of law; convictions of attempt and aiding and  
15 abetting and criminal forfeiture and money laundering and  
16 conspiracy, all predicated on violations CLS's violations [sic]  
17 of Section 841(d)(1)[sic] were likewise flawed." Petitioner  
18 contends he was denied the effective assistance of trial and  
19 appellate counsel when they failed to raise this issue.

20 Petitioner's contention is unsupported by any facts or legal  
21 analysis. The Second Superseding Indictment charged petitioner  
22 with, among other violations, several counts of aiding and  
23 abetting the attempted possession of hydriodic acid, a listed  
24 chemical, knowing, or having reasonable cause to believe that the  
25 hydriodic acid would be used to manufacture methamphetamine, in  
26 violation of 21 U.S.C. §§ 846 and 841(d)(2). Because hydriodic

1 acid is a listed chemical, petitioner's claim that he was denied  
2 the effective assistance of counsel when counsel failed to raise  
3 this argument fails.

4 **T. Ground Twenty-Nine.**

5 Petitioner contends he was denied effective assistance when  
6 trial counsel

7 failed, in spite of repeated instructions and  
8 detailed information provided by Mr. Mincey,  
9 to introduce and/or develop evidence,  
10 including witness and expert witness  
11 testimony, and the obtaining and preparation  
12 of exhibits, on theory of the defense, lack  
13 of knowledge, CLS's compliance with  
14 California and Federal regulation and  
15 statute, and other evidence concerning the  
16 basis for the lack of knowledge of wrongdoing  
17 by Mr. Mincey or CLS. This resulted in the  
18 defense's theory of defense instruction being  
19 denied. Further, the theory of defense on  
20 knowledge and reliance on officials,  
21 regulations, and statutes, was not  
22 appropriately argued to the jury or the  
23 court.

24 Petitioner's conclusory assertion does not entitle him to  
25 relief. Petitioner does not describe the evidence or testimony  
26 upon which he bases this claim and makes no specific showing that  
this evidence would have been relevant and admissible to  
petitioner's defense of lack of intent to violate the law and  
reliance on officials. Petitioner's contention that Mr. Hodgkins  
did not "appropriately" argue the defense case to the jury does  
not demonstrate ineffective assistance of counsel under the  
Strickland standard.

**U. Ground Thirty.**

1           Petitioner asserts he was denied effective assistance "when  
2 his trial counsel failed to argue and/or file appropriate motions  
3 for judgment of acquittal both during and after trial, as  
4 provided in Federal Rules of Criminal Procedure 29."

5           Petitioner is not entitled to relief on this ground. Mr.  
6 Hodgkins made an oral motion for judgment of acquittal at the  
7 close of the Government's case-in-chief. In addition, Mr.  
8 Hodgkins filed a motion for judgment of acquittal and new trial  
9 arguing that there was "little, if any indication that the  
10 required elements of the offenses charged in the Indictment were  
11 met" and that "there is a lack of evidence of the required mental  
12 elements for all counts." In addition, Mr. Hodgkins joined the  
13 motion for judgment of acquittal filed by co-defendant Betty Lou  
14 Lewis with regard to the sufficiency of the evidence to support  
15 Count 23. A motion for judgment of acquittal challenges the  
16 sufficiency of the evidence. The Ninth Circuit ruled on direct  
17 appeal that the evidence was sufficient to support petitioner's  
18 convictions. Petitioner's conclusory assertion that the motions  
19 for judgment of acquittal made by Mr. Hodgkins were not  
20 "appropriate" does not suffice to establish that he was denied  
21 the effective assistance of counsel in the making and arguing of  
22 the motions for judgment of acquittal.

23           Therefore, this ground for relief is denied.

24           **V. Grounds Thirty-One and Thirty-Two.**

25           Petitioner contends he was denied the effective assistance  
26

1 of trial and appellate counsel when counsel failed to raise that  
2 the United States had conducted an unconstitutional search of  
3 CLS's business premises on November 4, 1997.

4  
5 Petitioner's claim is without merit to the extent that it is  
6 based on the alleged failure of trial counsel to raise this  
7 issue. On November 17, 1998, co-defendant Richard Simonsen filed  
8 a motion to suppress evidence seized during the execution of a  
9 search warrant on November 4, 1997 at 801 98<sup>th</sup> Avenue, Oakland,  
10 California, the business premises of CLS. This motion was joined  
11 by petitioner on November 30, 1998. The motion to suppress was  
12 denied by Order filed on January 8, 1999.

13 Petitioner's claim is without merit with respect to  
14 appellate counsel as well. Petitioner makes no showing that the  
15 court's denial of the motion to suppress was in error.

16 ACCORDINGLY:

17 1. Petitioner Terry Crandall Mincey's Motion to Vacate, Set  
18 Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is denied.

19 2. The Clerk of the Court is directed to enter judgment for  
20 respondent.

21 IT IS SO ORDERED.

22 **Dated: June 2, 2005**  
668554

**/s/ Robert E. Coyle**  
UNITED STATES DISTRICT JUDGE